

## The Physician as an Expert Witness

Irving Rosenheimer  
*Marquette University*

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Irving Rosenheimer, *The Physician as an Expert Witness*, 1 Marq. L. Rev. (1917).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol1/iss2/7>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# THE PHYSICIAN AS AN EXPERT WITNESS.

IRVING ROSENHEIMER, '17

In a discussion of the manner in which a physician may be called upon to testify in a court of law, it may be stated first that a physician may be required to take the stand in either of two capacities. He may be called to testify in regard to facts which he has observed as an ordinary layman, such facts being relevant to the issue in the case, or he may be called upon to enlighten the court and jury with respect to the medical side of certain facts proved or assumed, in which case he testifies as an expert along the medical lines involved.

His attendance in court is compelled in the same manner and the rules as to his examination and cross-examination and the admissibility of the evidence he gives apply in the same way as in the case of any other witness.

Whether or not a physician is a competent witness is a matter to be determined by the court, since from the peculiar character of expert evidence it will be readily understood that before giving such evidence one must show the qualifications which peculiarly enable him to pass upon the questions involved. Counsel may ask of the proffered physician witness preliminary questions for the purpose of showing that such proffered witness has the qualifications necessary to enable him to testify as an expert, and these questions need not be exhaustive or particularly searching. If the court, however, having heard the responses of the physician to questions put to him by counsel, is not satisfied that he has qualified as an expert, he has the right to put such additional questions as he may deem necessary.<sup>1</sup> Upon such examination, where a physician stated that he considered himself qualified to testify as an expert, such statement was held to be irrelevant and improper.<sup>2</sup> In order that a physician be brought within the rules as to qualifications, however, he must at the time his evidence is being given, be testifying to matters requiring the knowledge of a medical expert, and not as to something which is within the powers of observation of any person. It was so held as to testimony of a physician that he found plaintiff's eye had been injured

---

1. *Laros v. Commonwealth*, 84 Pa. 200.

2. *Naughton v. Stagg*, 4 Mo. App. 271.

by some object, that he washed the eye, sent plaintiff to a hospital and removed a metal splinter, and other evidence along that line, the court saying in that case that the physician was testifying as to matters within the power of observation of any ordinary person, such testimony requiring no medical knowledge, and as a result the rules as to qualifications were held not to apply.<sup>3</sup>

The question has at different times been raised in qualifying a physician to testify as an expert, whether it is necessary that the qualification be based upon reading and scientific research, or whether it must be based upon actual practise and experience along those lines which the testimony is to take, and it has been held that a knowledge gained through either of these two mediums is sufficient to qualify a proffered witness. Thus a physician was held to have qualified as an expert where he testified that his knowledge was based largely upon reading and studying medical authorities, while on the other hand a midwife was held competent and qualified to testify as an expert on a question of premature birth where her qualifications so to testify were based upon practise and experience alone.<sup>4</sup>

Where a medical practitioner is permitted to testify on certain matters, and the opposing counsel is of the opinion that such practitioner is not qualified to testify as he is doing, he may pursue either of two methods to prevent the probative effect of the evidence. He may object to the further reception of such evidence on the ground that the witness does not possess the qualifications necessary to enable him to testify as an expert, and have the testimony already given stricken out upon a ruling in his favor, or he may allow the testimony to come in and then upon the cross-examination, show that the witness does not fully understand the subject along which lines his testimony has been given, and so discredit such testimony with the jury. If neither of these two methods are employed, an objection coming in later on the ground that the physician has not qualified, will not be sustained.<sup>5</sup> Where the opposing counsel in seeking to discredit testimony already given by an expert, introduces another expert in his behalf, he may not ask his witness whether or not he concurs with the

---

3. *Hocking v. Windsor Spring Co.*, 131 Wis. 539.

4. Rogers, *Expert Testimony*, 47 p.  
*Mason v. Fuller*, 45 Vt. 29.

5. 139 Wis. 597-601.

statements made by the former witness, since this would be an unfair method of attack, but he may require his own witness to give an opinion upon the facts involved, unconnected with and entirely independent of the opinion already given.<sup>6</sup>

Passing on to those matters relative to which a physician may be called upon to testify as an expert, it may be stated as a general proposition, that the questions he may be required to answer in his capacity as a medical expert are about as varied and extensive in their scope as the field of medical knowledge; in short, his opinions may include everything upon which the physician, as a scientific man, as distinguished from a man of ordinary sound judgment, is entitled to pass.

A physician may give his opinion as to what was the cause of death; what symptoms would indicate death from a particular cause; whether a clot of blood such as had been found, could have existed twelve hours without causing death; and where several concurrent causes appear, he may state which, in his opinion, produced the death, as for example where there were several bruises and lacerations in a particular case, and also a dislocation of the vertebrae, the expert was allowed to give his opinion as to which of these two causes produced the death, and his reasons therefor.

A physician may give his opinion as to whether a still-born child would have been born alive if medical assistance had been rendered in time.<sup>7</sup> He may state the cause in his opinion of a miscarriage; that it was due to injuries received in a collision of street railway cars,<sup>8</sup> that it was due to negligence of a sleeping-car porter in failing to awaken the passenger in time to enable her to dress and prepare to leave the train properly clad, and in hurrying her from the car unclothed and unprotected from the inclemencies of the weather, such treatment of the party having been shown to have shortly preceded the miscarriage;<sup>9</sup> that it was due to mechanical means,<sup>10</sup> and whether such means were self-inflicted.<sup>11</sup>

---

6. *Horne v. Williams*, 12 Ind. 324.

7. *Telegraph Co. v. Cooper*, 71 Tex. 507.

8. 110 Cal. 513.

9. 94 Wis. 477.

10. 148 Ind. 259.

11. 65 Conn. 280.

In a Wisconsin case, a physician testified that "tuberculosis in the family of plaintiff's parents would show a strong susceptibility in all the family to tubercular infection, particularly in parts injured," and this testimony was held to be merely conjectural. This holding has been severely criticized by physicians, however, who assert that it is not a matter of conjecture, but a fact firmly established by precedent, that where there is a tendency toward tuberculosis in a family, an injury to a member thereof, may, and in many cases does, cause that latent tendency to manifest itself as a result of such injury.<sup>12</sup>

The physician may give his opinion based upon present symptoms as to the length of time a disease has existed, and he may also testify as to whether, in his opinion, a disease is incurable.<sup>13</sup> The physician may also, within certain limits, give his opinion as to the cause of certain injuries or wounds, citing on this point a case which arose in this state, in which it was held proper for a physician to testify that, in his opinion, the plaintiff's condition, as he found it, could have been produced by a wire heavily charged with electricity.<sup>14</sup> It has also been held proper for a medical witness to be asked a question in the following form: "Could the injuries have been caused, as a whole, by a fall through a hole in a sidewalk?"<sup>15</sup>

In examining a physician, however, as to the probable cause of a certain injury, the witness, in response to questions put to him by counsel, should not be allowed to ascribe with too great attention to detail, the cause of such injury. A very amusing instance in which this was done is to be found in an Alabama case, in which the court characterized this attention to detail on the part of the witness as "misdirected zeal." In this case the plaintiff, while traveling over a railroad crossing on horseback, fell through the crossing by reason of the alleged defective condition thereof, and suffered rather severe injuries. During the course of an examination of an expert witness as to the probable cause of the injuries, he was asked to state what, in his opinion, might have caused injuries of this particular character, whereupon the witness, in all seriousness replied that in his opinion, tak-

---

12. *Bucher v. Wis. Cent. R. R. Co.*, 139 Wis. 597-608.

13. 79 Fed. Rep. 896.

14. 89 Wis. 371.

15. 75 Wis. 18.

ing into consideration the nature and character of the injuries, and after a careful examination thereof, they might have been caused "by a fall from a mule or a horse falling through a railroad crossing." Mr. Justice Somerville in criticizing this answer said, "It was competent for the witness, Dr. S., to give his opinion as an expert, that the injuries to the plaintiff were caused by a fall of some kind, but not by a fall from a mule or a horse at a particular crossing, as to the facts of which he neither knew nor pretended to know anything."<sup>16</sup>

In an examination of a medical expert on the stand, the very important principle must be borne in mind that a question must be so framed as not to cause the physician to invade the province of the jury. The courts of some states have gone to great lengths in excluding medical testimony on this ground, as witness a Michigan case where it was held that objection was properly taken to the following question, "From the appearance of the wound, what would you say it was caused by?" Mr. Justice Sherwood said, "The question calls for the fact which was to be found by the jury. What might have caused it, would have been proper, but what did cause it was the real question for the jury."<sup>17</sup> Upon this same point being raised in a Minnesota case, Justice Mitchell delivered an opinion which is very clear upon the subject and which expresses the weight of opinion in the majority of the states in the following language: "It is laid down in the books that a question to an expert witness should not be so framed as to invade the province of the jury, but the line of cleavage between what does and what does not invade the province of the jury is not capable of definite location by any exact rule applicable to all cases, without regard to the subject of inquiry. The mere fact that the opinion called for covers the very issue which the jury will have to pass upon, is not conclusive that it is not the proper subject of expert or opinion evidence. For example, sanity or insanity is the subject of expert testimony, although that may be the sole issue to be determined by the jury. Neither do we appreciate the fine distinctions sometimes sought to be drawn between asking an expert whether, in his opinion, certain causes might produce certain results, and asking him whether they did produce such results." This opinion serves to bring out the point

---

16. 89 Ala. 318.

17. *People v. Hare*, 57 Mich. 505.

that it is quite difficult to determine whether an answer to a question would or would not invade the province of the jury, and attention must be given to the facts of each individual case; and even then, as stated in the opinion, the fact that the answer to such question would determine the very issue which the jury is called in to try, is not conclusive that such question is improper.

As to the force and effect which is to be given to expert medical testimony by the jury in the course of its deliberation, there is a great diversity of opinion among the courts of the several states. One line of decisions is to the effect that expert evidence should be received with caution, and being a mere expression of opinion, is not entitled to receive the same weight as testimony by an ordinary witness of a fact within his own knowledge. On the other hand, other courts have held that expert testimony should be considered like other evidence. The best and most logical statement of the weight of authority on this proposition is to be found in Mr. Roger's work, where he states his opinion as follows: "Where the expert states precise facts of science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts so stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance, because it states only a probability. Where the opinion is speculative, theoretical and states only the belief of the witness, while some contrary opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury."<sup>18</sup>

Wisconsin, on this point, seems to be in line with the decisions holding that medical testimony is of very little weight. That such is apparently the opinion of the Supreme Court is stated at length in the case of *Baxter vs. Chicago & Northwestern R. R. Co.*, 104 Wis. 307, in which the court through Justice Marshall says as follows: "As before indicated, the ease with which experts can be arrayed on each side of a controversy, especially where the human anatomy and human afflictions, their cause and probable results are the subject of inquiry and two theories be sustained by the evidence of reputable men, skilled in their calling, each theory fitting with exactness the necessities of the side on which it is advanced, is an unexplainable mental phenomenon

---

18. Rogers, Expert Testimony, Ch. II.

which all have experienced who have had much to do with the trial of cases," and an expression to practically the same effect is to be found in the case of *Bucher vs. Wis. Cent. Ry. Co.*, 139 Wis. 597, in which the court characterizes expert testimony as "proverbially unreliable at best," although the testimony of physicians especially is not arraigned with that degree of severity which characterizes the *Baxter* case above cited. Whether or not the courts of Wisconsin have not been somewhat severe in their view of the probative force of expert medical testimony in view of the opinions of other jurisdictions, is a question; but the fact remains that expert medical testimony in this state is putting up its last defense, is being rendered limb from limb and is gradually succumbing to the force of judicial onslaught.

---

## A HANDY TREATISE UPON THE SUBJECT OF JUDICIAL NOTICE.

(A paper prepared for the Review by Dr. M. I. Clear of the day shift of the Quick Result Correspondence School.)

### I. NOTICE IN GENERAL.

As has perhaps never before been urged, there are several different kinds of notice in law. Besides the statutory 3-day and 30-day notices to quit or pay rent, which are too intimately known to the profession at large to deserve more than passing mention in this treatise, we have to consider the nature and effect of actual, constructive and judicial notice. Dr. Pomeroy, in his able and exhaustive work on Equity Jurisprudence has treated the subjects of actual and constructive notice to such an extent that it has been thought best not to revive them, but to proceed unhindered to the more restricted field of Judicial Notice.

### II. JUDICIAL NOTICE—ORIGIN AND EARLY HISTORY.

After years of unceasing and intensive research into the archives of the past, together with a careful perusal of the many cogent and scholarly works on the subject prepared by authors of no little ability, the writer has been at pains to discover that